Filed 4/10/19 In re Kayla I. CA5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re KAYLA I. et al., Persons Coming Under the Juvenile Court Law.	
KERN COUNTY DEPARTMENT OF HUMAN SERVICES, Plaintiff and Respondent, v. VICTOR I., Defendant and Appellant.	F077413 (Kern Super. Ct. Nos. JD137420 & JD137421) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Raymonda B. Marquez, Judge.

Suzanne M. Nicholson, under appointment by the Court of Appeal, for Defendant and Appellant.

Mark L. Nations, County Counsel, and Bryan C. Walters, Deputy County Counsel, for Plaintiff and Respondent.

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When this dependency case began, Sandra G. (Mother) had four children: Brenda G. (10 years old), Kayla I. (7 years old), Moses G. (5 years old) and baby Fernando F. (approx. four months old) (hereafter "Royce").[1] Mother lived with the biological father of Royce, both of whom are named Fernando F.

Appellant Victor I. is the father of Kayla I. and Moses G. He is not the father of Brenda G. or Royce.

The Kern County Department of Human Services (the "Department") alleged that Royce had sustained substantial nonaccidental physical injuries: four rib fractures, a broken right tibia, a broken right femur and bruising. Mother, the primary caretaker, had no explanation for the injuries.

All four children were removed from Mother's custody. Kayla I. and Moses G. were placed with appellant. At the disposition hearing, the court placed Kayla and Moses back with Mother. Appellant challenges that decision.[2]

We conclude that, under any standard of review, the evidence clearly showed either Mother and/or Fernando caused the serious injuries to Royce, yet they continued to deny it. The failure to acknowledge their abuse showed that the risk of harm they posed had not been mitigated, even though they had successfully taken several classes. This evidence required removal of the children, and we, therefore, reverse the order placing Kayla and Moses with Mother.

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[1] To avoid confusion with the baby's biological father, who shares the same name.

[2] As a result, the placement of Brenda G. and Royce is not at issue in this appeal.

Appellant's opening brief has a stray comment that jurisdiction should have been dismissed as to Kayla I. and Moses G. It is unclear if appellant is requesting that this court dismiss the dependency cases. Either way, we decline to do so. It is true that the Department at one point planned to dismiss the dependency cases as to Kayla and Moses. The Department subsequently changed its position. We are presented with no legal authority *requiring* the Department to dismiss the dependency cases as to Kayla and Moses, which is a different issue than whether evidence compelled their removal from Mother at the dispositional hearing.

FACTS

Facts Concerning Removal of Children

On May 21, 2017, Royce was brought to urgent care. The chief complaint was that the baby had been "fussy" for "1 day." The doctor's assessment was that the baby had bronchitis, which could be addressed by Albuterol.

The next day, Mother took Royce to a different health care provider. She said he had bruises on his body, a cut on his lip, had been congested for two weeks and cries when his legs are grabbed. Mother said she was "[u]nsure" how the baby got the bruises. The doctor examined Royce and found bruises on his right knee, chest, thigh, and lower back, and an abrasion on his lip.[3]

The doctor referred Royce to the emergency room. He was eventually transferred to Valley Children's Hospital in Madera. There, a bone survey revealed multiple fractures. The impressions from the bone study included, "[a]cute appearing right fourth fifth sixth and seventh rib fractures"; "[n]ondisplaced hairline distal right femur fracture"; and "corner fractures of the proximal and distal right tibia." The doctor concluded the findings were "highly suspicious for nonaccidental trauma."

Mother said that on May 12, she and Royce fell asleep in a bed. Royce turned and fell to the floor approximately three feet down. However, the doctor at Valley Children's Hospital concluded the baby's reported fall on May 12, "does not provide a reasonable explanation" for the injuries.

The doctor from Valley Children's Hospital told a sheriff's deputy that her professional opinion was that Royce's injuries were caused by nonaccidental trauma, and she believed the baby was the victim of child abuse. A sheriff's deputy came and placed

[3] Mother later claimed the urgent care provider had also observed that Royce had abrasions on his lip. However, the medical records from the urgent care visit include physical examination notes and nothing is mentioned about abrasions on the baby's lips.

a Welfare and Institutions Code section 300[4] hold on Royce. Fernando F. denied abusing Royce, but Mother "never said a word and never looked up. She kept staring at the floor and would not look at" the sheriff's deputy.

Though Royce was officially in protective custody, he remained at the hospital for treatment. Fernando F. and Mother remained at the hospital as the baby received treatment.

Officers took custody of the three other children living with Mother and Fernando F.: Brenda G., Kayla I., and Moses G.

Court Proceedings

On May 25, 2017, the Department filed section 300 petitions as to each of the four children, alleging that Royce had sustained substantial nonaccidental physical injuries: four rib fractures, a broken right tibia, a broken right femur and bruising. Mother, the primary caretaker, had no explanation for the injuries.[5]

The detention hearing was held on May 26, 2017. The court ordered the children detained. The court also deemed appellant the presumed father of Kayla I.

Appellant "immediately" expressed interest in placement of Kayla I. and Moses G. On June 1, 2017, Kayla and Moses were placed with him.

Social Worker's Interviews with Children

Moses G. told the social workers that he always had food and that no one fought in the house. When asked what happens when he gets in trouble, Moses said his Mother would hit him with a belt. Kayla I. also said Mother would hit her with a belt.

Moses G. spontaneously told social workers that " 'Fernando [F.] is mean.' " Moses said Fernando had " 'spinned [Royce] around' " causing the baby to cry. Moses said, " 'I'm not going to talk about that.' "

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[4] All further statutory references are to the Welfare and Institutions Code unless otherwise stated.

[5] The petition also noted that Kayla I. and Moses G. were hit with belts at home.

Brenda G. said she had never seen her mother spank or hit any of her siblings. Brenda said Royce had been crying for a day and a night straight.

Social Worker's Interview with Mother

Mother said her sister would care for Royce while she was at work.

Mother said her children were "jealous" of Fernando F. and did not like him because he was not their father.

Mother told the social worker she thought it might be best if Kayla I. went to live with appellant. She then asked whether appellant "could use that against her" in a custody dispute. The social worker said, "[I]t could give him strength in a custody battle." Mother said she "would not want Kayla with him then."

On May 26, 2017, the social worker informed Mother that Kayla I. and Moses G. would likely go to appellant, Mother said she understood and "had no objection to that 'temporarily.' "

Appellant's wife, F.R., said that Kayla I. told her and appellant that Mother would hit her. Appellant and F.R. would look for bruises whenever Kayla came to visit. Appellant had previously contacted Child Protective Services about his concerns.

Appellant claimed Mother would not let him visit Moses G.

Visitation

On June 5, 2017, Mother had a supervised visit with the children. Moses G. told Mother that he "wanted his dad," and Mother said, " '[G]ood, that's where you're going to live.' " Mother did not exhibit any concerning behavior during the visit.

On June 7, 2017, Mother had another supervised visit. Near the end of the visit, Brenda G. said, " 'Well you know every parent hits their kids there's just no way around it, I don't know why they took all of us away for the baby getting hurt.' " Mother replied, " 'Yes I know, it would be different if we were on drugs or something like that.' "

A report signed June 29, 2017, described some prior CPS referrals involving the parties, most of which were determined to be unfounded.

August 24, 2017 Visit

As of August 2017, the visits between Mother, Fernando, and the children were taking place at a location called Heaven's House. The visits were described to have "gone well" and no issues or concerns were noted.

On August 24, 2017, Mother and Fernando had a visit with Royce and acted affectionately towards him.

Mother's Participation in Classes

Mother attended 14 out of 18 classes on "Nurturing Parenting" with one excused absence and one unexcused absence. She was "punctual" and "meaningfully engaged during group discussions."

Mother attended all 11 of her individual counseling sessions. She "actively participates in sessions, seeks additional knowledge, and displays commitment to reaching goals."

Mother's assignments, attitude and participation in physical abuse classes were rated "excellent."

A printout indicates Mother's "Pre-Test Score" was 32 and her "Post-Test Score" was 76. The printout does not explain these numbers further.

Mother completed her classes on December 14, 2017.

Fernando F.'s Participation in Classes

Fernando F. attended 14 out of 15 his "Physical Abuse as a Perpetrator" class. He had one unexcused absence. Fernando's "assignments" in the class were rated "above average"; while his participation and attitude were rated "excellent."

Fernando F. attended 11 out of 11 individual counseling sessions. He was "observed actively engaging in finding solutions to his obstacles in counseling."

Fernando F. attended 16 out of 18 classes on "Nurturing Parenting" with two unexcused absences. "[Fernando F.] actively participated during class by engaging in group discussions on class topic[s]."

A printout indicates Fernando F.'s "Pre-Test Score" was 36 and his "Post-Test Score" was 92. The printout does not explain these numbers further.

Fernando F. completed his classes by February 20, 2018.

November 10, 2017 Report

In a report signed November 10, 2017, the Department acknowledged Mother and Fernando F.'s regular visits and active participation in their case plan. However, the Department recommended that reunification services be denied to Mother and Fernando because they have "maintained their lack of awareness as to the cause of the injuries to their infant son" and because of the "severity of the injuries."

The report noted that there were no concerns with appellant's care of Kayla I. and Moses G. The Department recommended that Kayla and Moses remain in appellant's custody and that their dependency cases be dismissed.

Additional Events

On November 14, 2017, Mother informed a social worker she was pregnant.

On December 15, 2017, a child and family team meeting was held with social workers, Fernando F., Mother, appellant, appellant's wife, and Mother's sister. The Department told Mother they would likely to keep Kayla I. and Moses G. with appellant and dismiss their petitions. The social worker asked when Mother would like to see the children if appellant was their primary caretaker. Mother said she would like to have them every other weekend. The social worker asked if she would like any more time during the week, but Mother "declined stating every other weekend was fine."

Brenda G. had unsupervised all-day visits with Mother on four occasions from December to January and one overnight weekend visit in January. No issues or concerns arose from the visits.

Nonetheless, in a report signed January 18, 2018, the Department asked the court to take jurisdiction because "it is clear the child [Royce] was severely physically abused, either by the parents or someone they chose to have provided care for the child."

Jurisdictional Hearing

The jurisdictional hearing was held on January 19, 2018.[6] At the hearing, the Department indicated that, as to the baby, it would dismiss the allegation under subdivision (e) of section 300, on the condition that Mother and Fernando F. would accept the court's jurisdiction under subdivisions (a) and (b) of section 300.[7] Accordingly, the court struck the subdivision (e) allegation without prejudice and found true the allegations under subdivisions (a) and (b).[8]

As to the three other children, Brenda G., Kayla I. and Moses G., the Department urged that the court take jurisdiction because Mother and Fernando F. still had neither taken responsibility for, nor offered an explanation, for Royce's injuries. After argument, the court found true the jurisdictional allegations as to the three other children.

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[6] The reporter's transcript appears to erroneously list the date for this hearing as April 19, 2018.

[7] Subdivision (e) concerns allegations that a child under the age of five "has suffered severe physical abuse by a parent, or by any person known by the parent, if the person knew or reasonably should have known that the person was physically abusing the child." Subdivision (a) concerns allegations the child "has suffered, or there is substantial risk that the child will suffer, serious physical harm inflicted nonaccidentally upon the child by the child's parent or guardian." Subdivision (b) concerns allegations the child "has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child, or the willful or negligent failure of the child's parent or guardian to adequately supervise or protect the child from the conduct of the custodian with whom the child has been left[, etc.]"

[8] Appellant argues that a dependency court's findings at the jurisdictional hearing are prima facie evidence the child cannot safely remain in the home. For that proposition, he cites *Hailey T.*, *supra,* 212 Cal.App.4th at page 146, which in turn cited section 361, subdivision (c)(1). However, as the Department correctly notes, *Hailey T.*, overstated the scope of jurisdictional findings that constitute prima facie evidence of danger. Section 361, subdivision (c)(1) only provides that jurisdictional findings *under subdivision (e) of section 300* shall constitute prima facie evidence that the minor must be removed. (§ 361, subd. (c)(1).) Here, the subdivision (e) allegation was dismissed. Therefore, the "prima facie" provision of section 361, subdivision (c)(1) does not apply.

Mother's counsel then asked the court to grant the Department discretion to place "the children" with Mother and Fernando F. Appellant's counsel opposed that request, noting that Kayla I. and Moses G. had been with appellant "for quite some time," and Mother had agreed to appellant's custody of the children with visitation. The Department agreed with appellant and opposed Mother's counsel's request. The court granted the Department discretion to place Brenda G. back with Mother and Fernando, but denied discretion to place Royce, Kayla or Moses with Mother and Fernando. The court did grant the Department's discretion to expand Mother's visitation times.

February 15, 2018 Visit to Appellant's Home

On February 15, 2018, a social worker made an unannounced visit to appellant's home. At the time, the family was getting ready to sit down for dinner. "The home was in good repair, well maintained and there were no observable health or safety concerns. The children's bedrooms were clean and adequately furnished."

During the visit, appellant told the social worker that Fernando F. had followed him in his car for several blocks, taunted him, and told him to pull over so they could fight. In a subsequent report, appellant's wife told the social worker that Fernando was using belligerent language and "throwing up gang like signs." Kayla I. and Moses G. were not in the car when the incident happened, but appellant's other child – a 13-year-old – was.

Additional Events

Fernando F. told the social worker that Mother and Kayla I. were discussing on the phone the possibility of Mother having more children, and Kayla said: " '[M]aybe next time, make sure you don't break their bones.' " On February 8, 2018, Mother had a visit with the children and extended maternal relatives at Chuck E. Cheese. Mother paid attention to the children and engaged them in positive, age-appropriate play. Mother "used appropriate method[s] of discipline for the children's ages and the situation."

A social worker received a letter dated February 18, 2018, from someone claiming to be Mother's sibling (the signature on the letter was apparently illegible). The letter claimed that, at the end of the Chuck E. Cheese visit, appellant had told Kayla I. to tell Brenda G., " '[A]t least my dad doesn't break my bones.' " Appellant denied the accusation.

On February 20, 2018, Mother cancelled a visit on short notice due to her having "pain and pressure" related to pregnancy.

On February 23, 2018, appellant provided a screenshot of a text message he claimed came from Fernando F. The message, which was in Spanish, was translated by someone at the Department. The translation, which is nonsensical at parts, was as follows:

> "Garabito answer pig! Come alone on Tuesday! Pig if you have testicles! To walk alleging with women [f*g*ot]! I'll be waiting for you there to see if you're so tough who from Sinaloa f[**]king Honduran pig."

On February 25, 2018, Mother had a visit with Brenda, Moses, Kayla and Royce. She again engaged the children in positive, age-appropriate play; gave clear directions/instructions; and "used appropriate method[s] of discipline for the children's ages and the situation."

In a report signed March 5, 2018, the Department again recommended the court award sole physical custody of Kayla I. and Moses G. to appellant and terminate their dependency cases. The report noted:

> "[Fernando F.] has either indirectly or directly enhanced the quarrels between [appellant and Mother], by following [appellant], and texting [appellant], and making threats to his safety while with his children, [Kayla I.] and [Moses G.]. Thus, displaying a complete disregard for the well-being and safety, of the children, and demonstrating ineffective conflict resolution skills. [Fernando's] reported behavior is of concern to this Department due to his inability or unwillingness to resolve matters in a more constructive and non violent manner. [Fernando] has completed Physical Abuse as a Perpetrator which included subject matter including but not limited to, managing anger, controlling anger, reducing anger;

> however, despite him completing counseling, he continues to actively engage in violent outbursts, and fails to implement coping and anger management skills learned."

The report noted: "[I]t has been reported [appellant] makes distasteful comments and inappropriate comments about [Mother], in the presence of the children."

Appellant's Petition

Appellant filed a section 388 petition, requesting the court grant him sole physical custody of Kayla I. and Moses G., and grant Mother limited visitation rights.

Birth of Baby Ivan F.

Mother gave birth to her baby, named Ivan F., in March 2018. A nurse at the hospital reported Fernando F. had "smelled like alcohol."

A social worker met with Mother at the hospital. Mother said she wanted to have "all" her children returned to her care. The social worker told Mother that the "other two children" (i.e., Kayla I. and Moses G.) "have a safe and stable home and no need to continue as juvenile dependents."

Mother also told the social worker that she sometimes did not want to visit with Moses G. because of his poor behavior. Moses would jump "all over the place" and was difficult to redirect. Moses would also tell Mother, " 'I don't like you.' " Yet, later in the conversation, Mother claimed Moses wanted to come "home." Mother said she "would be okay with a 50/50 type of arrangement" with appellant.

The social worker asked Fernando F. about "his willingness to move out of the home while he completed the suggested Anger Management counseling; as he had mentioned in court." Fernando said he was no longer willing to move out. Fernando said he needed to help Mother with the new baby.

The social worker asked Fernando F. if he had "texted" appellant, and Fernando admitted he had. Fernando pointed out that appellant had responded. However, Fernando denied following appellant in his car.

The social worker told Mother and Fernando F. they could take Ivan F. home, and they would receive voluntary family maintenance services. That same day, the social worker requested a child family team meeting to discuss a possible placement change for Kayla I. and Moses G.

March 28, 2018 Interviews with Kayla I. and Moses G.

On March 28, 2018, the social worker spoke with Kayla I. Her interaction was recounted in a report as follows:

> "I asked Kayla if she wanted to show me her room and talk with me. She smiled and agreed. I observed Kayla wearing clean clothing, neatly groomed, and in good spirits. I observed her bedroom clean and neatly organized. I asked Kayla if she was enjoying Spring break and she indicated she was. I asked Kayla what grade she was in and she told me she was in the 2nd grade. I asked if she had talked to her mother lately. She told me she had not and stated[,] '[T]here [were] no visits this week.' I asked if she knew why. She told me she did not. I shared with Kayla, her baby brother was born and told her he had a lot of hair. Kayla smiled and told me she had not seen him. I told her she would soon see him. I asked Kayla if she was going to do anything fun this Easter vacation. She told me she was going to have a birthday party. I asked her if she had a theme. She responded 'unicorns' and told me she has 3 piñatas, two unicorns and one K. I told her I was excited for her.
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> "I told Kayla I had not had the opportunity to meet her and talk to her. I discussed my role as a court intake Social Worker to Kayla, telling her it was my job to make sure kids are safe in their home and that nothing bad is happening to them. I asked Kayla if she could have her wish to live anywhere where would she like to live. Kayla responded[,] 'I would like to live with my daddy.['] I questioned why she likes her daddy's house. She responded[,] '[B]ecause he buys me stuff, and he is making me a party.' I questioned if these things don't happen at her mommy's house. And she nodded her head side to side signaling no. I asked if there was any other reason she did not want to live with her mother. She told me she likes her father's home better saying[,] 'I am afraid at my mom's.' I asked her what she was afraid of and she responded[,] 'I'm scared that she might break my bones and my ribs like my baby brother.' I asked Kayla if anyone tells her to say these things to her Social Workers. She told me no and said[,] 'I just feel afraid.' I questioned Kayla what would happen to her when she got in trouble at her mom's house. She responded[,] '[S]he would hit me, seven times.' I asked Kayla if she knows what happened to her baby brother.

She told me Moses told the girl, when they went to court, saying[,] 'Fernando was rolling his hands, with Moses and my baby brother, and was spinning him around, and dropping him on the sofa.' I asked Kayla if Moses was laughing and she told me he was. I asked her if her baby brother was laughing and she responded[,] 'I don't remember, but I think he was crying.' I questioned if she saw this happen, she told me no, saying[,] '[M]ost days' she was always with her grandmother who took care of them. I asked Kayla if she misses her grandmother she responded[,] 'I miss her a lot.' Kayla stated she used to visit on Sunday or Saturday[]s, but had not seen her anymore and this makes her feel sad. I asked Kayla if the judge asked what she wants, what she would tell her. She responded[,] '[T]hat I want visits with my mom and to stay with my dad.'

"I asked Kayla if she was afraid of the mouse at Chuck-E-Cheese she smiled and told me no. I shared my son was afraid of the mouse and did not like him. She smiled. I asked Kayla if she could tell me about what happened at Chuc[k]-E-Cheese. She told me they were playing games and then was told it was time to go. She stated she and Brenda were walking out when Brenda told her[,] '[D]on't be scared of your dad' and Kayla responded[,] '[A]t least my dad doesn't break my bones.' Kayla followed by saying[,] '[S]he then told me that my dad is fat.' Kayla informed her Aunt … and her mother, looked at Brenda, then her mother pulled her hair. I questioned if her mother pulled Brenda's hair lightly or hard. Kayla responded[,] '[H]ard.' I asked her if Brenda was crying. She told me she was not. I asked if she and Brenda were having an argument or fighting. She told me she was not. I asked her if anyone asked her to say those things to Brenda. She told me no one did. I asked her why she would tell her that, she shrugged her shoulders upwards and downwards and told me she did not know, I questioned Kayla if at anytime someone chased them or followed them; while she was in a car with her father. Kayla nodded her head side to side and told me no."

The social worker also spoke with Moses G., who was 5 years old at the time. Moses said he wanted to live with Mother because " 'she lets me do whatever I want.' " Moses also " 'wish[ed]' " he could have stairs like at his Mother's house because he could take part of his bed and slide down the stairs. The social worker told Moses that was dangerous. Moses said living with appellant was " 'kinda good, but appellant " 'doesn't let me do whatever I want.' "

Moses G. told the social worker later that day that he did not like Fernando F. because "he is not my dad." The social worker asked Moses to tell her about the time

Fernando "spinned him around." Moses said, " '[O]h, I don't like that.' " Moses said, " 'I don't want to talk about that' " and then said, " 'I don't like Fernando.' " Eventually, Moses explained Fernando grabbed his legs, spun him, threw him to the couch and hit him. Moses then said, " '[O]kay, I have no more words.' "

Additional Events

On March 31, 2018, a social worker visited Mother's residence. The home was in good repair with no observable health or safety hazards.

A child family team meeting was held on April 2, 2018. Fernando F. indicated he had enrolled in an anger management program. The Department informed everyone that it would be recommending that Mother receive family maintenance services. After the meeting, appellant approached the social worker and expressed concern about the children. He was upset and noted the Department "has not found out who injured the child … and now are sending them back to their mother …."

On April 13, 2018, a social worker spoke with Fernando F. about Moses G.'s description of being spun around. Fernando said he did spin Moses around " 'but it was like, like when you are playing around, but not violently.' " Fernando claimed Moses "liked it." Fernando denied throwing Moses onto the couch.

In a report dated April 16, 2018, the Department described its change in recommendation as follows:

> "The Department has re-evaluated this case based on new and current circumstances. The [M]other … gave birth to her son [Ivan] on March 23, 2018, *leading to changes in recommendations*. The parents, [Fernando], and [Mother], have successfully completed the recommended initial case plan and have maintained appropriate and adequate housing. The Department will be offering Voluntary Family Maintenance for the newborn child. Subsequently, [t]he Department will be recommending Family Maintenance Services for [all four children]." (Italics added.)

The Department's report acknowledged that the children have adjusted well in appellant's home and have a good bond with appellant. Nonetheless, the Department

made clear its recommendation was that the children – including Kayla I. and Moses G. – be returned to Mother with "liberal" visitation granted to appellant.

Dispositional Hearing

The dispositional hearing was held on April 19, 2018.[9] Near the conclusion of the hearing, the court ordered the children, including Kayla I. and Moses G., placed with Mother.

In its ruling, the dependency court emphasized the "incongruen[cy]" between the Department's prior recommendations as to Brenda G. versus Kayla I. and Moses G. The court pointed to the apparent contradiction in saying that Brenda was safe in Mother and Fernando F.'s care, but the other children were not. Similarly, the court noted that returning Kayla and Moses to Mother would show "consistency" with the Department's decision not to remove Ivan F.

The court also pointed to Fernando F.'s enrollment in an anger management course.

Appellant appeals the placement order as to Kayla I. and Moses G.

DISCUSSION

Appellant argues the court erred in returning Kayla I. and Moses G. to Mother at the dispositional hearing. Appellant contends the evidence showed the children would be subjected to a substantial risk of harm if returned.

A. Standard of Review

This is an unusual case in that the Department was not seeking removal of the children, but another party was. The parties agree that there is no case directly on point concerning the standard of review applicable here. The Department urges that we apply the compelled-as-a-matter-of-law standard, while appellant contends the substantial evidence standard applies.

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[9] Appellant was elevated to presumed father of Moses G. at this hearing.

"[T]he allocation of the burden of proof in the lower court determines our standard of appellate review." (*In re Aurora P.* (2015) 241 Cal.App.4th 1142, 1153 (*Aurora P.*).) The substantial evidence standard of review applies when the lower court concludes a party *successfully* carried its burden of proof. (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.) The compelled-as-a-matter-of-law standard applies when the lower court concludes a party *failed* to carry its burden of proof.[10] (*Ibid*.)

Consistent with these principles, appellate courts apply the substantial evidence standard when the lower court finds a party *successfully* carried its burden of proving substantial risk of harm (e.g., *In re Henry V.* (2004) 119 Cal.App.4th 522, 529), but apply the compelled-as-a-matter-of-law standard when the lower court finds a party *failed* to carry its burden of proving substantial risk of harm. (E.g., *In re Luis H.* (2017) 14 Cal.App.5th 1223, 1226–1227.)

Here, appellant did not prevail in the lower court. If he bore the burden of proof below, then this is a "failure of proof" case and the compelled-as-a-matter-of-law standard applies. If he did not bear the burden of proof, then the substantial evidence test would apply.

To determine who bore the burden of proof below, we ask: What does the statutory scheme dictate as the default result "in the absence of a contrary showing"? (*Aurora P.*, *supra*, 241 Cal.App.4th at p. 1159.) Whoever sought a result *other* than this "default result" bore the burden of proof. (*Ibid*.)

At the dispositional hearing, the default result that obtains in the absence of a contrary showing is that the child is returned to the offending parent. (Cal. Rules of Court, rule 5.695(c)(1).) As a result, the Department contends that appellant, as the party seeking removal, bore the burden of proof.

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[10] The reason the substantial evidence test cannot be applied in the latter situation is that it would improperly allow an appellant to attack "the evidence supporting the party who had no burden of proof." (*I.W.*, *supra*, 180 Cal.App.4th at p. 1528; see also *In re R.V.* (2015) 61 Cal.4th 181, 218.)

The Department argues that since appellant bore the burden of proof and failed to carry it, the appropriate standard of review is the compelled-as-a-matter-of-law standard. Appellant disagrees, arguing "there was no substantial evidence that the children would not be at substantial risk if returned to mother's custody." (Original underline) A third standard of review used in some dependency contexts is the "abuse of discretion" standard. (See *In re Sheila B.* (1993) 19 Cal.App.4th 187, 199.) That standard only permits reversal where the lower court's decision "exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [citations]." (*Bridget A. v. Superior Court* (2007) 148 Cal.App.4th 285, 300.) Neither party contends the abuse of discretion standard applies here.

We need not resolve who bore the burden of proof below or which standard of review applies on appeal, because we conclude that even under the standard most favorable to the Department, the orders must be reversed.

B. Analysis

For the reasons explained below, we conclude the evidence of substantial risk of harm compelled removal of Kayla I. and Moses G.

1. The Evidence of Risk of Harm Compelled Removal

The risk of harm in this case has been clear. A helpless, months-old baby in the care of Mother and Fernando F. suffered horrific abuse. The baby had four broken ribs, a broken right tibia, a broken right femur and bruising on his right shin. The treating physician offered her medical opinion that the injuries were caused by nonaccidental trauma. No credible alternative to abuse has been shown. Mother, Fernando, and Mother's sister are the only people who watched the baby. Given the undisputed medical opinion that the injuries were nonaccidental, we are left with what the Department agrees is only one plausible conclusion: Mother and/or Fernando abused Royce.[11] Yet, neither

[11] Mother and Fernando said that Mother's sister was the only other person to care for Royce. No one suggests Mother's sister was involved in the abuse of Royce. To the

Mother nor Fernando have taken responsibility.[12] Because of the clear risk of harm posed, we are surprised that Kayla I. and Moses G. were not removed at the dispositional hearing.

2. The Evidence Cited by the Department Does not Alter the Fact that the Evidence of Harm Risks Compelled Removal

In arguing removal was not compelled by law, the Department essentially points to three factors: (1) Mother and Fernando F. did well with their case plan; (2) Brenda G. was not abused or neglected while in their care for the months preceding disposition; and (3) Mother and Fernando's visits and observed care of Ivan F. raised no concerns. However, none of these developments directly mitigate the core risk of harm that has driven this entire case: Royce was severely abused, and we can only conclude that either Mother and/or Fernando were the abusers and will not take responsibility.

It is true that Mother and Fernando F. have successfully participated in classes, including a class called "Physical Abuse as a Perpetrator." Such classes are helpful in alleviating the risk of harm if Mother and/or Fernando were the perpetrator(s) of the abuse. Yet, neither has acknowledged responsibility or provided a plausible explanation. We do not see how abusers can be said to have alleviated the risk of harm they pose if they continue to deny ever abusing the victim.

3. No Rational Basis for the Department's Change in Recommendation has Been Provided

We also note that we are troubled by the Department's unusual turnabout in its recommendation concerning Kayla I. and Moses G., because it appears to have been

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contrary, the Department acknowledges that either Mother and/or Fernando caused the injuries. Additionally, the primary law enforcement detective – Detective O'Nesky – interviewed Mother's sister and "had no concerns about her."

[12] The Department concedes that Mother and Fernando deny abusing Royce. However, the Department argues they did "take responsibility" for the abuse by "excelling in their case plan." We do not agree that diligently participating in their case plan is tantamount to taking responsibility for the abuse of Royce.

driven by the birth of Ivan F. The Department said it "re-evaluated this case based on new and current circumstances. The mother … gave birth to her son on March 23, 2018, leading to changes in recommendations."[13] However, the fact that Mother had another baby would seem to have little bearing on whether she and Fernando F. posed a risk of harm to their children.

When changing its recommendation, the Department also noted that Mother and Fernando F. had completed their initial case plan. But this does not explain the *change* in recommendation, because the Department had been recommending Moses G. and Kayla I. stay with appellant even after Mother and Fernando had successfully progressed in their case plan. For example, in its report signed January 18, 2018, the Department provided the following analysis and recommendation to the court:

> "[Royce], age three months at the time, sustained non accidental injuries which included five broken ribs, a broken femur, a broken tibia as well as various bruises. Neither parent has offered a reasonable explanation as to how the child's injuries occurred. The injuries were determined to be non accidental and it is clear that the child was physically abused. The child was just three months old at the time the injuries occurred and was basically defenseless to his perpetrator. *While the parents have made substantial progress in their initial voluntary case plan*, neither has taken responsibility for the injuries to the child, which causes great concern to this Department. The Court is asked to find the Jurisdictional recommendations true as it is clear the child was severely physically abused, either by the parents or someone they chose to have provided care for the child." (Italics added.)

By this time, Mother had completed her nurturing parenting classes in December 2017. Yet, as the Department's analysis correctly suggests, Mother and Fernando F.'s progress in their case plan does not mitigate their failure to take responsibility for the severe injuries to the baby. There is no reasonable explanation as to why the Department's position changed from January 2018 to April 2018.

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[13] Moreover, the social worker requested a meeting to discuss a possible placement change for Kayla I. and Moses G. *immediately* after leaving the hospital following Ivan F.'s birth.

4. The Dependency Court's Concern with "Consistency" Does not Undermine Risk of Harm

In its ruling, the dependency court emphasized the "incongruen[cy]" between the Department's prior recommendations as to Brenda G. versus Kayla I. and Moses G. The court pointed to the apparent contradiction in saying that Brenda was safe in Mother and Fernando F.'s care, but the other children were not. Similarly, the court noted that returning Kayla and Moses to Mother would show "consistency" with the Department's decision not to remove Ivan F. None of the concerns about consistency, however, contradict or undermine the evidence of risk of harm. Arguably, it would have also been consistent for the court to have removed all the children from Mother, including Brenda.

The court also pointed to Fernando F.'s enrollment in an anger management course. But the ability of such a class to reduce the risk of harm to the children is largely connected to whether Fernando was the abuser. If he was the abuser, his failure to take responsibility indicates he still poses a risk even if he takes yet another class.

CONCLUSION

In sum, we conclude the clear and convincing evidence of risk of harm compelled removal of the children from Mother at the dispositional hearing.[14] Nothing in this opinion directly precludes future changes in placement based on appropriate evidence and considerations.

DISPOSITION

The order that Kayla I. and Moses G. be "placed" with Mother is reversed. The court shall order Kayla and Moses removed from Mother's physical custody pursuant to

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[14] Here, there are no reasonable inferences from the evidence other than: Mother and/or Fernando inflicted severe, nonaccidental trauma on Royce and still have not admitted their involvement even after participating in services. As a result, removal was compelled as a matter of law. We have no occasion to decide what the proper outcome would have been under different facts – e.g., if there had been substantial evidence that someone else could have caused Royce's injuries or that the injuries could have been caused accidentally; if Mother or Fernando had admitted their involvement; or if Royce's injuries had not been so severe.

section 361, subdivision (c)(1). The matter is remanded for further proceedings consistent with this opinion.

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POOCHIGIAN, J.

WE CONCUR:

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LEVY, Acting P.J.

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MEEHAN, J.